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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**
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10 PETITION TO AMEND ETHICAL
11 RULES 5.4 AND 7.2, RULE 42,
12 ARIZONA RULES OF THE SUPREME
13 COURT
14

Supreme Court No. R-10-0023

**Comment of the State Bar of
Arizona on Petition to Amend
Ethical Rules 5.4 and 7.2, Arizona
Rules of the Supreme Court**

15 The State Bar of Arizona in general endorses the Maricopa County Bar
16 Association's goal of changing the applicable Ethical Rules to allow it to charge a
17 percentage of client fees to its participating lawyers. The State Bar's Legal Services
18 Committee "strongly support[s]" the MCBA's proposed amendments because the
19 lawyer-referral fees "make up a significant portion of the funds used to run the
20 Volunteer Lawyer Program" and "[w]ithout a rule change, this funding source will
21 be lost and countless individuals may not get access to the legal services they
22 need."
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26 The State Bar wishes to point out to the Court several policy concerns with

1 the proposed changes, however.

2 Changing the rules as proposed – thus legislating to allow one reputable
3 service to require that its member lawyers share their fees with a non-lawyer –
4 opens the door to the possibility that less-than-noble (albeit purportedly not-for-
5 profit) referral services will open up shop to do the same.
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8 The possibility of unintended consequences derives from Ethical Rule (ER)
9 7.2(b). ER 7.2(b) prohibits Arizona lawyers from giving “anything of value to a
10 person for recommending the lawyer’s services,” except under certain
11 circumstances. One exception to this flat prohibition on referral fees is paying the
12 “usual charges” of a not-for-profit lawyer-referral service. That exception is not
13 limited to reputable county bar associations. The rule-change proposal and the
14 emergency rule allow *all* not-for-profit lawyer-referral services¹ to adopt the same
15 kind of percentage fee-sharing system that the MCBA wishes to continue using. As
16 a result, anyone -- reputable or otherwise -- could create a not-for-profit lawyer-
17 referral service and require participating lawyers to give the service a cut of their
18 fees.
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23 ¹ It also would apply to for-profit services that might become “qualified,” if a mechanism to
24 qualify for-profit services is ever adopted. ER 7.2(b)(2) defines a qualified lawyer referral service
25 as one that has been approved “by an appropriate regulatory authority.” Because no mechanism
26 for qualifying or approving exists, for-profit lawyer-referral services cannot, for all intents and
purposes, operate in Arizona because Arizona lawyers would not be allowed to participate in
them. If a qualifying mechanism is adopted by an appropriate regulatory authority, however, then
for-profit services could adopt the same fee structure as the MCBA and require that lawyers pay a
percentage of client fees.

1 Opening the door in this way is significant because no Supreme Court rules
2 set operating standards for referral services. No mechanism for qualifying for-profit
3 services exists, nor are they subject to any kind of review, oversight or certification.
4 Although the MCBA's rule-change petition advises that percentage fee-sharing is
5 allowed by the American Bar Association Model Supreme Court Rules Governing
6 Lawyer Referral and Information Services (Model Rule IX, attached as Appendix C
7 to its petition), Arizona has not adopted that model rule, which includes a
8 regulatory scheme and standards for services.
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12 One solution might be to limit the amendment of ER 7.2(b) to a lawyer-
13 referral service operated by an existing or currently operating not-for-profit
14 organization, or even specifically to a county bar association, if that could be
15 defined.
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17 Another concern is that the MCBA's proposed fee-sharing arrangement is not
18 limited to any particular type of legal fees or even to court-approved fees. ER
19 5.4(a)(4) currently provides the only exception for lawyers to share fees with a non-
20 lawyer. That sharing is allowable only with nonprofit organizations and, most
21 importantly, as a result of court-awarded fees. The MCBA's fee structure – as
22 authorized by its proposed changes to ERs 5.4 and 7.2 – requires participating
23 lawyers to give a percentage of their fees in *all* referred cases to the MCBA. While
24 fee-sharing among lawyers is common in personal-injury cases, the idea of
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1 requiring Arizona lawyers to provide a portion of their fees derived from criminal
2 or domestic-relations cases to a non-lawyer certainly is not.

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4 Finally, no mechanism exists for determining or verifying how the lawyer-
5 referral service uses its share of legal fees. The proposed changes to ER 7.2(b)(2)
6 would allow a not-for-profit service to use its cut of client fees to “defray the
7 reasonable operating expenses of the service or organization and to fund public
8 service activities, including the delivery of pro bono legal services.” The proposed
9 comment defines “reasonable operating expenses” and “public service activities.”
10 But the Ethical Rules govern only lawyers, so neither this Court nor the State Bar
11 has formal leverage or authority over a private lawyer-referral service, only the
12 lawyers who participate in it. In short, the proposed changes allow a private
13 organization, over which neither this Court nor the State Bar has direct authority, to
14 take a cut of fees paid by clients to their lawyers and use the fees to support its
15 general operations.
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20 In conclusion, the State Bar, while in general supporting the MCBA’s goal of
21 maintaining its fee structure as an avenue to providing legal services to an
22 underserved population, urges the Court to consider the concerns outlined above.
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24 If this Court is inclined to permanently adopt the MCBA’s proposed rule
25 changes, the State Bar suggests revising the beginning of the proposed ER 7.2(b)(2)
26 as follows:

1 pay the usual charges of a legal service plan or a not-for-profit or
2 qualified lawyer referral service, which may include charges, in
3 addition to any membership fee, may include a fee calculated....

4 [Additions to the MCBA's proposal double underlined, deletions in strike-out.]

5 RESPECTFULLY SUBMITTED this 24th day of May, 2010.

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10 Electronic copy was filed with the
11 Clerk of the Supreme Court of
12 Arizona this 24th day of May, 2010.

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